Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1995

WILEMAN BROS. & ELLIOTT, INC.; KASH, INC.; GERAWAN FARMING, INC.; ASAKAWA FARMS, INC.; CHIAMORI FARMS, INC.; PHILLIPS FARMS, INC.; KOBASHI FARMS, INC.; TANGE BROS., INC.; NAGAO FARMS; NILMEIER FARMS; CHOSEN ENTERPRISES; GEORGE HUEBERT FARMS; WILMER HUEBERT FARMS; KOBASHI FARMS; NAKAYAMA FARMS, INC.; and MIHARA FARMS,
Cross-Petitioners,

vs.

DANIEL R. GLICKMAN, Secretary of Agriculture,
Cross-Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

THOMAS E. CAMPAGNE
(Counsel of Record)
CLIFFORD C. KEMPER
JEFFREY C. HEEREN
THE LAW FIRM OF
THOMAS E. CAMPAGNE &
ASSOCIATES
1685 North Helm Avenue
Fresno, California 93727
(209) 255-1637
Attorneys for Cross-Petitioners

Bowne of San Francisco, Inc., Law Printers (415) 362-2300

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QUESTIONS PRESENTED

1. Does the Secretary of Agriculture violate core First Amendment values and trigger the strict scrutiny test (rather than the *Central Hudson* intermediate scrutiny test) by forcing California nectarine, peach, and plum growers (including respondents/cross-petitioners) to pay mandatory assessments into a "generic" advertising program where the advertising dollars and selection of advertising messages are controlled by a committee of respondents/cross-petitioners' competitors who can and do use the funds to promote their own varieties to the detriment of cross-petitioners' varieties, without providing any credit toward assessments for brand advertising conducted by respondents/cross-petitioners?

2. Can the Secretary of Agriculture, consistently with the Administrative Procedure Act and decisions of this Court, amend his regulations in 1988 and apply the amendment retroactively to 1980 to validate his tree-fruit committee's practice of requiring only California growers (including cross-petitioners who raise yellow skinned varieties of fruit) to throw away "regular" matured fruit worth millions of dollars and to sell only "well mature" fruit when the Secretary allows the committees, whose members grow red skinned varieties of fruit and directly compete with cross-petitioners, to define "well-matured" by the redness of the skin of the fruit, regardless of the actual internal maturity of the fruit

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CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners respectfully file this conditional cross-petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 58 F.3d 1367 and reproduced in petitioner's Appendix at pp. 1a-39a. The Opinion of the District Court is unreported, and reproduced in petitioner's Appendix at pp. 40a-112a.

JURISDICTION

The Court of Appeals entered judgment on June 27, 1995. Petitions for rehearing were denied on September 18, 1995. Following an extension of time granted by Justice O'Connor, petitioner filed its petition for writ of certiorari on January 24, 1996. The petition was docketed on January 25, 1996. This is a conditional cross-petition pursuant to Supreme Court Rule 12.5. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

In addition to the provisions noted by petitioner U.S. Department of Agriculture ("USDA"), Cross-Petitioners submit additional relevant provisions of the Agricultural Marketing Agreement Act, the Administrative Procedure Act and Title VII of the Code of Federal Regulations. Specifically:

Relevant provisions of the Agricultural Marketing Agreement Act of 1937 are 7 U.S.C. 608c(7) and 608c(14). They are reproduced at App. to Cross-Petition at pp. 1a-2a;

Relevant provisions of the Administrative Procedure Act are at 5 U.S.C. § 552. It is reproduced at App. to Cross-Petition at p. 3a;

Additional relevant regulations implementing the Act are 7 C.F.R. §§ 51.1530, 51.3153, 916.30, 916.51, 917.40, 917.35, and the Nectarine, Plum and Peach Maturity Regu-

lations from 1979 through 1995 located at 7 C.F.R. §§ 916.352, 916.356, 917.447, 917.460, 917.446 and 917.459. They are reproduced at App. to Cross-Petition at pp. 4a-17a.

STATEMENT OF THE CASE

A. Introduction

This conditional cross-petition requests review of two challenges to provisions in the marketing orders for California peaches, plums, and nectarines issued by the Secretary of Agriculture under the Agricultural Marketing Agreement Act of 1937, as amended ("AMAA" or "Act"),[1] should this Court deem it appropriate to grant USDA's petition.

First. The Ninth Circuit found the forced "generic" advertising program for peaches, plums, and nectarines invalid under *Central Hudson Gas & Elec. Corp. v. Public Service Comm.'n,* 447 U.S. 557 (1980). USDA seeks review by this Court arguing that the Ninth Circuit went too far because *Central Hudson* requires more exacting scrutiny than should apply here and that *Abood v. Detroit Bd. of Educ.,* 431 U.S. 209 (1977) and *Keller v. State Bar of California,* 496 U.S. 1 (1990) should control in analyzing the impingement of cross-petitioner's free speech and association freedoms, if any, related to the tree fruit forced "generic" advertising program. If this Court deems it appropriate to hear USDA's argument that a different constitutional standard applies to the speech at issue, cross-petitioners respectfully suggest that the Ninth Circuit did not go far enough—strict scrutiny should apply to the compelled speech at issue herein.

Second. The Ninth Circuit rejected cross-petitioners' contention that "well-matured" regulations enforced by the tree fruit commodity committees were not validly promul-

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[1] 7 U.S.C. §601 *et seq.*

gated in 1980. The Ninth Circuit's conclusion that the Secretary "intended" to raise the maturity standards is insufficient to change the applicable law during the harvest seasons at issue. The Appellate Court decided an important federal question in a way that conflicts with relevant decisions of this Court. Regulations subject to the Administrative Procedure Act cannot be afforded the "full force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act. See, *Chrysler Corp. v. Brown,* 441 U.S. 291, 313 (1979); *NLRB v. Wyman-Gordon Company,* 394 U.S. 759, 764 (1969).

B. Litigation History

This matter began as a Title 7 U.S.C. § 608c(15)(B) review of agency action challenging provisions of the nectarine, plum, and peach marketing orders (7 C.F.R. §§ 916 and 917) issued by the Secretary under the AMAA.

Cross-petitioners directly compete in marketing nectarines, plums and peaches with the entire tree fruit industry, to include the chairmen and committee members of the nectarine, plum and peach committees. Most, if not all, market their nectarines, plums and peaches in California, as well as throughout the United States, and often compete for Cross-petitioners' buyers, brokers and growers. [C.R. 27 W/K-I, *Baker, Finding Nos. 50, 54 and 59, pp. 122-123].*[2]

[2]In accordance with the Rules of the Supreme Court, Rule 12.7, Cross-petitioners cite to the administrative record which was made a part of the underlying record of the Ninth Circuit. W-K-I refers to the parties' first administrative proceeding, conducted in 1988. W/K-II refers to the second administrative proceeding conducted in 1990; R.T. refers to the Reporter's Transcript of that proceeding, followed by the name of the witness and the pages within the transcript referenced; references to *Baker* are to the Administrative Law Judge's findings in her May 18, 1989 Decision and Order, which is part of the Ninth Circuit's record at Clerk's Record (C.R. 27).

Prior to May, 1980, Nectarine Regulation No. 10, Plum Regulation No. 14, and Peach Regulation No. 10, required nectarines, plums and peaches to meet the requirements of U.S. No. 1 grade. Said regulations stated that when used herein [U.S. No. 1] shall have the same meaning as set forth in United States Standards for nectarines, plums and peaches. App. to Cross-Petition at p. 8a, 12a, 14a. U.S. No. 1 Standard means that point where the fruit has reached that stage in the maturity process that it will continue to ripen after being picked from the tree. [*7 C.F.R. §§ 51.1530, 51.3153*]. App. to Cross-Petition at p. 4a.

In 1980, proposed rules were issued for nectarines, plums and peaches, which still required nectarines, plums and peaches to meet the requirement of U.S. No. 1 grade, and went on to add (and it remained the same until 1988): "Provided, that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service." Said provisions went on to state that U.S. No. 1 means the same as defined in the United States Standards for Grades of Nectarines, Plums and Peaches. App. to Cross-Petition at pp. 8a, 12a, 14a.

The Nectarine, Plum and Peach Committees, desiring a "higher" maturity standard, asked the Federal-State Inspection Service (SPI) (meaning, Shipping Point Inspection) to raise the maturity level. The committees were advised by SPI that they could not change the U.S. Standards because they applied to all States, the committees were further advised that if they desire a "higher" maturity level for the fruit, they should get the marketing order amended to require a "well-matured" standard. [*W/K-I, Botkin, R.T., pp. 1155-1156*].

The Nectarine, Plum and Peach Committees, without authority from the Secretary of Agriculture, and in direct violation of the AMAA, took it upon themselves to create a

"higher" maturity level. Pursuant to the directions of the commodity committees, California Tree Fruit Agreement (CTFA) (as employees of the committees) issued new "regulations." In what was referred to as Nectarine Bulletin No. 1, CTFA supplied to all growers and handlers of nectarines a Bulletin which "sets forth everything you need to know about nectarine regulations for the 1980 marketing season." The Bulletin stated that all varieties of nectarines will be U.S. No. 1 with the following exception: "*Maturity*—Nectarines shall be "well-matured" which means that they meet the color standard established for each variety. This maturity requirement is more advanced than the maturity requirement of the U.S. No. 1 grade." [*W/K-I, Exhibit No. 2, MS-8-A-1*].

The Bulletin went on to indicate the purported authority for the new "maturity" standards, and on page 3 stated:

> "Your attention is directed to the new and advanced maturity requirement set forth on page 1 of this bulletin. This new maturity regulation was adopted by the *Nectarine Administrative Committee*. The new maturity level is based on color standards that have been developed and established by the Inspection Service and an industry maturity subcommittee. The color standards will be applied on a varietal basis and the maturity subcommittee will be available to deal with any maturity problems that arise."

[W/K-I, Exhibit No. 2, MS-8-A-1].

Immediately following the release of Nectarine Bulletin No. 1, CTFA, issued the Plum and Peach Bulletins which were substantially similar to that issued for nectarines, except with regard to plums, the fruit was to not only be "well-matured" but was also to meet "spring" requirements applicable to each variety and was required to satisfy these

requirements at the time of picking. [*W/K-I, Exhibit No. 2, MS-8-B*].[3] [4]

In 1987, cross-petitioners Wileman Bros. & Elliott, Inc. and Kash, Inc. filed administrative petitions [7 U.S.C. § 608c(15)(A)] with the United States Department of Agriculture ("USDA") alleging that the maturity regulations imposed on the California tree fruit industry were never lawfully promulgated and thus were unlawfully enforced by the nectarine, plum, and peach committees, appointed by the Secretary of Agriculture. Following a nine-day evidentiary hearing before USDA Administrative Law Judge Dorothea A. Baker, ALJ Baker ruled in favor of Wileman/Kash's contentions and found the nectarine, plum, and peach marketing orders invalid.

In June of 1988, Wileman/Kash filed a second petition challenging, *inter alia*, the forced "generic" assessment funded advertising program as violating freedom of association under *Abood v. Detroit Board of Education,* 431 U.S. 209 (1977) and *United States v. Frame*, 885 F.2d 1119 (3d Cir. 1989), and freedom of speech under *Central Hudson*, 447 U.S. 557. After an evidentiary hearing with approximately 20 days of testimony, ALJ Baker ruled in favor of Wileman/Kash on all issues and in dicta analyzed the forced "generic" advertising program finding it to be unconstitutional under both *Central Hudson and Frame.*

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[3] It should be noted that these "well-matured" regulations were never, through the 1987 harvest season, adopted by the Secretary of Agriculture, nor did they ever go through the Administrative Procedure Act process, nor were they ever published in the Federal Register. [*See: Wileman Bros. & Elliott, v. Giannini, 909 F.2d 333, 335 (9th Cir. 1990).*

[4] These new "well-matured" regulations were enforced by CTFA, under color of law, only against California growers. The other 25-35 states that grow tree fruit retained a U.S. No. 1 maturity standard.

Commencing with the 1987 harvest season, Wileman/Kash paid the assessments imposed by the marketing orders into an attorney-client trust account maintained by their attorney of record.[5] Despite Wileman/Kash's attempts to accommodate USDA, the U.S. Attorney's office filed assessment collection actions for injunctive relief ordering Wileman/Kash to pay over their assessment monies to the committees. District Court Judge Edward D. Price ordered the assessment monies at issue, plus all assessment monies for future harvest seasons, retained in trust pending final disposition of the challenged regulations.[6]

In the interim, cross-petitioners Gerawan Farming, Inc., Asakawa Farms, Inc., Chiamori Farms, Inc., Phillips Farms, Inc., Kobashi Farms, Inc., Tange Bros., Inc., Nagao Farms, Nilmeier Farms, Chosen Enterprises, George Huebert Farms, Wilmer Huebert Farms, Kobashi Farms, Nakayama Farms, Inc., and Mihara Farms filed administrative petitions raising similar issues to the Wileman/Kash petitions.

Thereafter, the Secretary of Agriculture's Judicial Officer issued decisions overruling Administrative Law Judge Baker on all issues favorable to cross-petitioners and affirmed on all issues favorable to USDA. Cross-petitioners filed com-

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[5] Approximately $.18-$.20 is assessed for every box of nectarines, plums and peaches packed in the San Joaquin Valley to cover the cost of advertising, inspection, and administration totaling approximately $10-12 million annually. Approximately 53% of these assessments fund the forced "generic" advertising program. See, App. to Pet. for Cert. at p. 8a, n. 3.

[6] More than $5.3 million of cross-petitioners' advertising and inspection assessments are now in trust with the Clerk of the United States District Court for the Eastern District of California.

plaints with the District Court seeking review of agency action pursuant to 7 U.S.C. § 608c(15)(B).

Cross-petitioners' various challenges to the marketing orders were heard on cross-motions for summary judgment. On January 27, 1993, the District Court ruled in favor of USDA on all issues, finding that the forced "generic" advertising program, while it "implicates the First Amendment rights of handlers forced to participate, it was enacted in furtherance of an ideologically neutral compelling state interest, and infringes on their rights to a minimum degree no more than necessary to achieve the stated goal." App. to Pet. for Cert. pp. 91a-92a. The District Court ruled that cross-petitioners' allegations regarding the "well-matured" maturity regulations were moot as USDA had since promulgated new regulations eliminating the "well-mature" standard.[7,8] App. to Pet. for Cert. pp. 56a-58a.

Cross-petitioners appealed to the Ninth Circuit. The Ninth Circuit reasoned that the compelled speech at issue

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[7]The parties stipulated that all cross-petitioners would rise/fall based on the decision issued by the District Court on the Wileman/Kash 7 U.S.C. § 608c(15)(B) Complaint. Upon the Court issuing its decision and judgment on the Wileman/Kash 15(B) Petition,the Court consolidated the remaining 14 cross-petitioners with Wileman/Kash for judgment and appeal.

[8]The same district court judge, in a related antitrust case (Wileman v. Giannini, CV-F88-251 OWW (E.D., Cal.)) in denying defendant committee members' motion to dismiss ruled ". . . the AMAA does not allow the marketing committee members or their agents to enforce maturity standards for the purposes of controlling output and causing harm to other growers and handlers . . . Plaintiffs' evidentiary showing is sufficient to preserve the issue of the antitrust liability of defendants for their actions as members or agents of the marketing committees in undertaking activities a reasonable official would understand impaired his competitors' ability to compete fairly in the market place in violation of federal law," in accord with Wileman v. Giannini, 909 F.2d 332 (9th Cir. 1990).

was commercial speech subject to analysis under *Central Hudson*, 447 U.S. 557, 566. App. to Pet. for Cert. p. 15a, 16a n. 7. The Ninth Circuit invalidated the compelled funding of the "generic" advertising program, concluding that the forced advertising program violated the First Amendment pursuant to *Central Hudson*.[9] See App. to Pet. for Cert. pp. 20a-21a. With respect to the maturity regulations for 1980-1987, without providing any analysis or explanation, the Ninth Circuit summarily concluded that the Secretary "intended" to increase maturity from U.S. No. 1 to "well-matured."

USDA petitioned for rehearing *en banc* on the First Amendment issue. The Court of Appeals denied USDA's petition for rehearing *en banc*.

LAW AND ARGUMENT

A. The Forced Imposition Of "Generic" Advertising Assessments Violates Cross-Petitioners' Core First Amendment Protection From Compelled Speech And Association

Cross-petitioners contend they cannot, consistently with the First Amendment, be required to finance, or be forced to associate with, an advertising program neither structured for

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[9]The Court, in determining that the speech undertaken through the generic advertising program was commercial speech, claimed that "[T]he handlers do not claim that any other type of speech is implicated." App. to Pet. for Cert. at p. 16a n. 7. The Court was mistaken. In "Appellants' Opening Brief" at pages 10-14 cross-petitioners argued, as they do herein, that being forced to fund a generic advertising program that is controlled by their competitors, for the benefit of their competitors, implicates their rights not to speak or associate with a message to which they disagree. Because the court found the advertising program at issue to be unconstitutional under the *Central Hudson* standard, the court did not address cross-petitioners' compelling governmental interest argument.

their benefit nor the tree fruit industry's benefit, promoting a message with which they disagree, and directly promoting their competitors' product.

The Agricultural Marketing Agreement Act of 1937, as amended, allows the Secretary of Agriculture, following reasoned decisionmaking, to collect assessments from handlers regulated under a marketing order for purposes of advertising. 7 U.S.C. § 608(6)(I). The Secretary, adopting the preferences of the nectarine, plum, and peach committees (consisting of cross-petitioners' competitors), opted to use "generic" instead of brand name specific advertising. 7 C.F.R. §§ 916.45 and 917.39. Collectively, cross-petitioners have been assessed in excess of one million dollars each harvest season—more than fifty percent of which is allocated toward the forced "generic" advertising program.

The Ninth Circuit invalidated the compelled funding of the "generic" advertising program, concluding that the forced advertising program violated the cross-petitioners' First Amendment commercial speech rights pursuant to *Central Hudson*, 447 U.S. 557.[10]

USDA's petition for writ of certiorari seeks review by arguing the Court of Appeals should not have applied *Central Hudson's* commercial speech test. Instead, USDA argues that it does not affirmatively restrict cross-petitioners' right to speak, but only compels them to fund speech that

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[10]The Ninth Circuit ruled that USDA failed the second prong of *Central Hudson*. The Court found no evidence that the forced "generic" advertising program was any better at increasing consumption than individualized advertising. See, App. to Pet. for Cert. p. 20a. USDA also failed the third prong of the *Central Hudson* test, in that only California handlers are required to pay advertising assessments, while approximately 25-35 states commercially handle peaches, nectarines and plums. USDA's claim that a more narrowly tailored program would result in free riders was found to be unpersuasive. "If the Secretary is concerned about free-riders, there are already plenty of them in other states." See, App. to Pet. for Cert. pp. 20a-21a.

USDA claims to be "generic," thus the appropriate test to apply is explained in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977) and its progeny: (1) compelled funding is germane to USDA's mission; (2) is justified by an important governmental interest and by the interest of avoiding free riders; and (3) does not significantly add to the burdening of free speech inherent in the allowance of the statutory scheme.[11] Pet. for Cert. p. 14 Cross-petitioners, however, assert in this cross-petition that the appropriate standard to apply to USDA's compelled funding of the forced "generic" advertising programs is strict scrutiny.

The First Amendment right of freedom of thought and association includes both the right to speak freely and the right to refrain from speaking at all. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633-634 (1943); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241 (1974); *Wooley v. Maynard*, 430 U.S. 705 (1977).

In *Riley v. National Federation of the Blind North Carolina, Inc.*, 487 U.S. 781, 108 S.Ct. 2667, 2677 (1988), this Court held that the level of scrutiny is determined by the nature of the speech compelled and the effect of the compelled statements: "Our lodestars in deciding what level of scrutiny to apply to a compelled statement must be the nature of the speech taken as a whole and the effect of the compelled statements thereon."

In *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 n. 11 (1993), the Court recognized that regulation neither aimed at the content of commercial speech nor the adverse effect stemming from the content of commercial speech could be subject to strict scrutiny. The obvert of this applied to the committees' compelled speech that purports to be "generic"—but is not—supports the conclusion that

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[11] USDA argued the opposite in the courts below—that *Central Hudson* applied, but *Abood* and its progeny did not.

the committees compelled substantially more than mere commercial speech, thereby subjecting the forced "generic" advertising program to more exacting scrutiny than *Central Hudson.*

When Congress, the States, or agencies regulate commercial speech, it is in the context of protecting consumers from false, deceptive or misleading information. When states have restricted commercial advertising by attorneys, it is for the same purpose, as well as to protect over-reaching by the attorneys. In these instances, the speakers all desire to engage in the particular commercial speech to begin with—they were not compelled to engage in speech to which they are allowed no input. Cross-petitioners admit that if they voluntarily wanted to advertise, the commercial speech test is appropriate to establish the parameters for regulating that speech. However, the compelled speech at issue herein reaches much further.

The forced "generic" advertising program requires cross-petitioners to promote their competitors' fruit. The marketing orders provide for "generic" advertising at the discretion of the Secretary; theoretically, no specific variety of any grower/handler is promoted through the Secretary's "generic" advertising program. [W/K-II, Exhibit No. 258]. Yet, the 1989 promotional chart, distributed throughout the nation by the committees, includes the promotion of the "Red Jim" nectarine, an exclusive proprietary variety of one of the commodity committeemen. [W/K-II, Exhibit No. 256; W/K-II, Parker, R.T., pp. 2275-2295].

The Red Jim nectarine directly competes with cross-petitioners' varieties and is admittedly one of the more popular varieties in the marketplace.[12] For cross-petitioners

[12]As a proprietary variety, cross-petitioners are not lawfully able to plant or sell the "Red Jim" nectarine, yet they are forced to pay assessments to promote their competitor's fruit.

to directly compete with the Red Jim nectarine, they must expend additional money and effort to promote their own varieties. Yet, while they expend their own money to compete with the Red Jim, the committees are, at the same time, expending cross-petitioners' "generic" advertising assessments to promote their competitor's variety. [W/K-II, *Gerawan*, R.T., p. 1767; W/K-II, *Parker*, R.T., pp. 2275-2295].[13] While cross-petitioners compliment the successful promotion of the Red Jim nectarine, they do not want their annual assessment dollars used by the committees to directly promote their competitor's fruit. Cross-petitioners take the position that the "generic" advertising program:

> "... is not helping me and I don't want my dollars being spent for me by a committee or anybody else. I will spend my own dollars on what I created and what I produce. .... It is proven that free enterprise and private industry is the essence of this whole thing.
>
> ... I am interested in advertising ... my label. I am not interested in putting my money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow. I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. Whether it is effective for them or not is of no concern ... if growers want to form their own co-ops and they want to

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[13]The district court found the use of generic advertising to promote a competitor's proprietary variety to be *de minimis* because the chart included 25 varieties of California summer tree fruits. However, upon reviewing the brochure [W/K-II, Exhibit No. 256] there are only 7 varieties of nectarines listed within the brochure. Six are "generic" and the seventh is the proprietary "Red Jim" variety exclusively marketed by nectarine committee member Jim Ito. Moreover, testimony demonstrates that the committees' attempt to promote "generic" varieties which are selected from *the top 15 most* popular varieties. This is not "generic" advertising—it promotes particular varieties selected by the committee members.

> be competitive . . . then God bless them, go for it. It is not a question whether CTFA is effective or not effective for anybody else. They are not effective for me, they are a hinderance to me. I am not here to judge what they do for somebody else."

[W/K-II, *Gerawan*, R.T. p. 1835-1836.]

Additionally, the committees' "generic" advertising program promotes, *inter alia*, two falsehoods that cross-petitioners cannot condone — that "red is better" and "all California fruit is the same." This is what is projected by the commercials advertising California fruit. Virtually every witness testified that different varieties of the same commodity have different tastes. Further, the same variety grown on different parcels of land will have differences in taste, color, size, amounts of soluble solids, etc. [W/K-II, *Mitchell*, R.T., pp. 4596-4597; W/K-II, *Chang*, R.T., pp. 2961-2963].

The tree fruit industry is extremely competitive, even in light of the program set up under the nectarine, peach, and plum marketing orders. Throughout the years, cross-petitioners have developed cultural practices that enable them to develop and harvest a high quality fruit—fruit they consider substantially superior to that grown by the majority of their competitors. They have invested substantial time and vast sums of money in developing these cultural practices. Cross-petitioners compete against each other and every other handler in the industry, including the individual committee members who control the "generic" advertising program. Cross-petitioners can survive by being efficient, smarter, and developing their own outlets for tree fruit that provide them a special niche. As a result of cross-petitioners' enterprise, they can expect a decent return on their substantial dollar investment.

Cross-petitioners, contesting the committees' excessive control of the tree fruit industry, have placed in excess of

5 million dollars in advertising and expense assessments, stemming from their suit with USDA dating back to 1987, in a court ordered trust account. When cross-petitioners are forced to spend this amount of money to speak and carry the message of the commodity committees, which expenditures do not assist their personal business programs, but are used to enhance the message of the commodity committees (cross-petitioners' competitors), one cannot contend that the burden is "small."

Cross-petitioners assert that when a businessman or a business is compelled to commercially speak and when they are further obliged to spend several hundreds of thousands of dollars each harvest season doing so, the protection afforded them must be greater than the tests used to restrict and regulate commercial advertising related to persons who voluntarily want to advertise to begin with, wherein the regulations merely seek to prohibit false, misleading or deceptive advertising.

The "commercial speech" at issue here and the regulations in question, compel cross-petitioners to carry out the message of their direct competitors on the commodity committees. Forcing corporations, like forcing businesses and individuals, to speak in a method and manner dictated by others, is an intolerable intrusion into exercising business judgment, and the Supreme Court has made it clear that the free speech clause of the First Amendment includes the choice not only to speak, but the choice not to speak at all. *Pacific Gas & Electric v. PUC of California* ____ U.S. ____, 106 S.Ct. 903, 912 (1986); *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 258 (1974).

Respondents recognize that the speech at issue in *Pacific Gas & Electric,* 106 S.Ct. 903 and *Tornillo,* 418 U.S. 241 was political speech. But it cannot be said that a businessman would bristle more at the government forcing him to carry a political message than he would if the government

ordered him to engage in commercial speech which advanced the position of his competitors, depleted his own funds that could otherwise be used to express his own advertising message, and compelled him to carry a commercial message, not his own, a message with which he wishes not to associate.

Moreover, in a purely commercial speech case, *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85, 97 S.Ct. 1614 (1977), this Court stated that the commercial speech aspect of the First Amendment protected not only the listeners, but the speakers. As to the speaker's First Amendment commercial speech rights, the Court stated in response to the government's assertion that other avenues of communication remained open:

> "Although in theory sellers remained free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound tracks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than 'For Sale' signs [Citation]; are less likely to reach persons not deliberately seeking sales information [Citation], and may be less affective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold [Citations]." *Id.*, at 97 S.Ct. 1618.

Compelled "generic" advertising is certainly less likely to reach the persons not deliberately seeking cross-petitioners' sales information. Cross-petitioners' advertising budgets are severely restricted when several hundreds of thousands of dollars are extracted each harvest season by cross-petitioners' competitors through the forced "generic" advertising program. The regulations unquestionably place an "economically chilling affect" on cross-petitioners' ability to speak as they prefer. Thus, their "option" necessarily involves more

costs and less autonomy due to the restrictions placed on their budgets by being forced to contribute to the "generic" message which they ideologically, philosophically, economically, morally and commercially find unacceptable. As a result, promotional material they otherwise would like to create and distribute is substantially curtailed, thus, the ability to project the message they desire necessarily becomes less effective.

In addition, the regulations at issue here prevent, or severely hamper, the free flow of commercial information to the public. The court in *Linmark*, 431 U.S. 85, after finding the township's regulation unconstitutional as to the speaker, also deemed the regulation unconstitutional because it limited the free flow of information to the listeners. The same can be said here. When cross-petitioners are required to spend hundreds of thousands of dollars each and every year to project their competitors' message, to communicate that message in a method and manner that does not reach their niche in the market place, does not reach their potential buyers or contribute to their sales, they are severally restricted from engaging in the advertising or promotion which will reach the listeners' ears to whom they would otherwise desire to direct their message.

A unanimous Supreme Court in *Meyer v. Grant* ____ U.S. ____ , 108 S.Ct. 1886 (1988), addressed the fact that even if regulation allows alternative means of disseminating information, it does not detract from cross-petitioners' First Amendment claim. The Court also discussed the fact that it is presumed that the speaker is in the best position to determine the most economical avenue for dispensing information, and government, through regulation, compelling a more costly avenue cannot escape First Amendment scrutiny.

"Here, the committees are forcing deceptive speech to both the consumer and other businesses. When cross-peti-

tioners are compelled to engage in speech that they do not desire to be a part of, they are forced into proclaiming to the public, and to other businesses, that they desire to engage in the propounded advertisement; that they believe in the message propounded; that advertising is necessary in their businesses; that they believe the type of message conveyed is reaching the audience they wish to reach; and, that this message is being conveyed of their own free will.

To any argument the committees assert, that no First Amendment issues have been raised as there can be no coercion when someone advertises a product he is in the business of selling, is to say that cross-petitioners' competitors can actively be involved in determining what cross-petitioners' views should or should not be.

> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein."

Abood v. Detroit Board of Education, 431 U.S. at 235.

It is certainly not for cross-petitioners' competitors on the committee to determine what is the best way for cross-petitioners to spend their money in speaking to the public about their products (amounting to approximately $200 an acre), nor is it appropriate for the committees to contend that cross-petitioners should not object to their money being expended to generically advertise a commodity that they are in the business of selling.

The injury sought to be avoided is undue governmental control in dictating an individual's natural right to choose his own way of life. Clearly, coerced participation injures cross-petitioners, both by forceably taking from them their time, money and reputation, then using their money to project another's message, not to foster legitimate purposes

of the AMAA, nor to improve their business position, but rather to finance an advertising program designed to benefit their competitors.

B. The Minimum Maturity Standard Applicable To Nectarines, Peaches and Plums From The 1980 Through 1987 Harvest Seasons Was U.S. No. 1 — Not "Well-Matured"

The Ninth Circuit without explanation concluded that the Secretary intended to raise the maturity standards in the 1980 amendments to the Nectarine, Peach and Plum Marketing Orders. App. to Pet. for Cert. at pp. 24a-25a.[14] The fact that the Secretary may have *intended* to raise the maturity standards is insufficient to change the applicable law during the harvest seasons at issue.

The four corners of the relevant marketing order maturity regulations (i.e., 7 C.F.R. §§ 916.356, 917.459, 917.460) provided that the minimum maturity standard to be applied was U.S. No. 1. Even assuming, as the Ninth Circuit found, the Secretary had the intent to change the law and increase the minimum maturity standard, this intent was never published in the Federal Register nor codified in the Code of Federal Regulations until 1988. As a result, the maturity standard remained at U.S. No. 1 throughout the 1980 through 1987 harvest seasons.

The Secretary's 1980 amendments to the Nectarine, Plum and Peach Marketing Orders provided that the Federal-State inspectors could utilize color chips or any other tests the inspection service deemed proper to determine whether a grower's tree fruit met the *U.S. No. 1 maturity*

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[14] The Ninth Circuit held that the application of color chips to the "well-matured" standard was not arbitrary or capricious. However, the determination of whether the maturity regulations or their application was arbitrary or capricious does not become an issue until the precise nature of the underlying regulations is ascertained.

standard. On their face, the 1980 amendments did *not* modify existing "law" with respect to tree fruit maturity. Instead, the 1980 amendments merely expanded the testing devices available to the inspection service for determining whether a particular lot of fruit met the U.S. No. 1 maturity standard. The fact that maturity could be measured by the application of color chips or any other test did not alter the existing maturity standard. *Wileman Bros. & Elliott v. Giannini*, 909 F.2d 332, 335 (9th Cir. 1990).

It is hornbook administrative law that an agency, in order to establish, amend, or alter an enforceable regulation or law, is required to properly promulgate and publish its intent according to specific and well-established procedures. These detailed procedures are set out in the Administrative Procedure Act (5 U.S.C. 551 *et.seq.*). A federal agency, such as the United States Department of Agriculture, must publish its regulations, and any changes or modifications thereto, in the Federal Register. 5 U.S.C. 552(a)(1)(D). *Anderson v. Butz*, 550 F.2d 459 (9th Cir. 1977). Simply put, even if an agency intended to effectuate a change to its regulations, if this intent is not procedurally sound and properly published, it cannot be the law. *PPG Industries, Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981).

To interpret the meaning of a regulation, a court must first look to the plain meaning of the language employed; i.e., the "four corners" of the regulation. If there is no ambiguity within the regulation's language, then the words used must be interpreted according to their common, ordinary meanings. *D & W Food Ctrs., Inc. v. Block*, 786 F.2d 757, 758 (6th Cir. 1986); *Anderson v. Butz*, 550 F.2d at 463. The Ninth Circuit concluded, without any clarifying analysis, that because in the "supplementary information" within the Federal Register the Secretary referenced the committees' desire for "higher" maturity, the Secretary intended to create the "well-matured" maturity regulations. App. to Pet.

for Cert. at p. 24a. The Court ignored that the Secretary did not incorporate any language allowing for heightened maturity standards in the amended regulations as published. App. to Cross-Petition at pp. 8a, 12a, 14a.

Nowhere in the 1980-1987 marketing order regulations does the Secretary state, or even imply, that the maturity level shall be "higher" or "well-matured." The regulations state that maturity will be U.S. No. 1, and that maturity will be determined by the application of color standards, per variety, or any other test deemed appropriate by the Federal or Federal-State Inspection Service. App. to Cross-Petition at pp. 8a, 12a, 14a. The Secretary did *not* establish a "higher" maturity standard or a "well-matured" standard. *Wileman v. Giannini*, 909 F.2d at 335. The Court and/or USDA cannot construe a regulation to contend what was never expressed. *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118-1119 (10th Cir. 1987).

When the terms of the statute are unambiguous, judicial inquiry is complete and conclusive. When the language is clear, the duty of the judiciary is to follow that language and give it effect. When the language of a statute is clear and unambiguous, the starting point for interpreting the statute is the language itself, and there is neither need nor warrant to look elsewhere. *Reuben v. United States*, 449 U.S. 424, 430 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); *U.S. v. Clark*, 454 U.S. 555, 560 (1982). "Legislative history should not be used as a guide to the meaning of a statute that is plain and unambiguous on its face." *McQuiston v. Marsh*, 707 F.2d 1082, 1084 fn. 1 (9th Cir. 1983).

The Ninth Circuit in *Wileman v. Giannini*, 909 F.2d. 322, analyzed these same marketing order maturity regulations and correctly concluded that "[t]he language of a regulation or statute is the starting point for its interpretation. The plain meaning governs unless a clearly expressed legislative

intent is to the contrary, or unless such plain meaning would lead to absurd results." *Id.* at pp. 335-336. The *Giannini* court acknowledged that the Secretary may well have intended to impose a heightened maturity standard on nectarines, peaches and plums. However, the regulations adopted and published " . . . do not effectuate this supposed intent. The court cannot rely on this vague suggestion of intent to rationalize or disregard the clear language of the regulation." *Id.*, 909 F. 2d. at 336.

A review of the Nectarine, Peach and Plum Marketing Orders and their amendments from 1979 through 1995 undeniably demonstrates that the minimum maturity grade in place during the 1980-1987 time period was U.S. No. 1 — not "well-matured." The term "well-matured" was never mentioned or published in the Federal Register or the Code of Federal Regulations until 1988. (App. to Cross-Petition at pp. 8a-17a.

For example, for years prior to and including 1979, the maturity standard for nectarines[15] as published in the Code of Federal Regulations read, in pertinent part, as follows:

> " . . . No handler shall handle:
>
> (1) Any package or container of any variety of nectarines unless such nectarines grade at least *U.S. No. 1.*

7 C.F.R. § 916.352 Nectarine Regulation 10 (emphasis added); See, App. to Cross-Petition at p. 8a.

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[15] Significantly, the language and timing of the amendments to the maturity regulations for peaches and plums virtually mirror those of the nectarine regulations. (The nectarine, peach and plum maturity regulations and their amendments for years prior to and including 1979 through the 1995 harvest seasons are reproduced at App. to Cross-Petition at pp. 8a-17a.

In 1980, the Secretary amended the nectarine maturity regulation within the C.F.R. to provide:

> " . . . No handler shall handle:
>
> (1) Any package or container of any variety of nectarines unless such nectarines meet the requirements of *U.S. No. 1 grade*: *Provided*, that maturity shall be determined by the application of color standards by variety or such other tests as determined to be proper by the Federal or Federal-State Inspection Service;"

7 C.F.R. § 916.356 Nectarine Regulation 14 (Emphasis added); See, App. to Cross-Petition at p. 8a.

The language of this regulation is not ambiguous. Any attempt by the Secretary or any other individual or entity to create an ambiguity by pointing to statements in extraneous documents such as "supplemental information" or tree fruit committee bulletins cannot be permitted.[16] The maturity regulation clearly and unambiguously retained the maturity level at U.S. No. 1, to be "determined by the application of color standards by variety or such other tests" which the inspection service determined to be appropriate—not "well-matured."

In contrast to the prior regulations, commencing in 1988 (and lasting through 1991), the nectarine maturity regulation within the C.F.R. read, in pertinent part:

> "(a) No handler shall ship:
>
> (1) Any lot or package or container of any variety of nectarines unless such nectarines meet the require-

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[16] An agency's "guidelines" which interpret its mandatory regulations must also be published or incorporated by reference in the Federal Register to have any legal effect. *PPG Industries, Inc. v. Costle*, 659 F.2d 1239 (D.C. Cir. 1981). Here, the tree fruit committee bulletins were never published or referenced in the Federal Register. The Bulletins are without legal effect. See also, *Dean v. Butz* 428 F.Supp. 477 (D.C. HA. 1977).

> ments of U.S. No. 1 grade, *except that nectarines shall be "well-matured" rather than "mature" but not overripe or shriveled."*

7 C.F.R. § 916.356 Nectarine Regulation 14 (emphasis added); See, App. to Cross-Petition at p. 9a.

Even the most simplistic reading of the nectarine maturity regulations conclusively illustrates the requirement that nectarines be "well-matured" rather than U.S. No. 1 was not adopted and/or published, and thus was not the law, until 1988.[17]

The language of the 1980 marketing order amendments with respect to tree fruit maturity regulations is clear and unambiguous. As a result, the Court need not look beyond the plain meaning of the language contained in the Code of Federal Regulations. The "well-matured" standard was neither published in the Federal Register nor codified in the Code of Federal Regulations prior to 1988. The minimum maturity standard, as set forth in the Code of Federal Regulations from 1980 through 1987, was U.S. No. 1. The tree fruit committees' successful efforts to enforce a maturity level above U.S. No. 1 grade from 1980 through 1987 were not permitted by the regulations, and clearly was not the "law."

A fundamental issue presented is whether the Secretary of Agriculture may raise the minimum maturity standard from U.S. No. 1 to "well-matured" (or any undetermined

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[17] It is noteworthy that the Secretary's 1988 amendment to the tree fruit marketing orders closely followed Administrative Law Judge Baker's Decision and Order in appellants' 7 U.S.C. § 608c(15)(A) administrative challenge to the validity of the "well-matured" standard wherein ALJ Baker concluded that the "well-matured" standard was never properly promulgated nor published, and thus was not the law.[W/K-I, C.R. 27].

standard above U.S. No. 1), without publishing amendments to existing regulations. Cross-petitioners contend that any attempt to change a law or regulation *the violation of which is punishable as a crime*[18] without providing sufficient notice to the public flies in the face of the Administrative Procedure Act and cannot be enforced against individuals without proper notice that their actions are unlawful.[19] A regulation issued by an agency must afford reasonable warning of proscribed conduct in light of common understanding and practices or it will not pass constitutional muster. *Ryder Truck Lines, Inc. v. Brennon,* 497 F.2d 230 (5th Cir. 1974). A statute or ordinance is unconstitutionally vague if it either does not give fair warning of proscribed conduct or if it amounts to unrestricted delegation of power that enables enforcement officials to act arbitrarily and with unchecked discretion. *Keeffe v. Library of Congress,* 777 F.2d 1573

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[18]Failure to comply with any of the terms of the marketing orders subjects a handler, upon conviction, to up to a $5,000.00 fine for each violation; each day in which a violation occurs is treated as a separate violation. See, 7 U.S.C. § 608c(14).

[19]The importance of assuring the clarity of regulations which carry a criminal penalty was addressed in *D & W Foods Ctrs. v Block, supra.* In this regard, the court stated:

> "Any remaining doubt that the Secretary's construction of § 606 must be rejected disappears when we consider the criminal provisions of the FMIA. Section 676(a) provides criminal penalties for violation of any section of the Act. No principal of law is better established than the necessity of criminal law speaking clearly. Accordingly, courts are bound to construe narrowly the applicability of any criminal statute. e.g. *United States v. Bass,* 404 U.S. 336, 346-48, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). Here, the Secretary invites us to adopt a construction of 'packing . . . or similar establishment' that is not plain in the statute or its regulation; that may remain unknown to most grocery stores for its lack of publication; and that might subject this plaintiff and hundreds of other similarly-situated businesses to criminal liability. We decline the invitation . . . D & W Foods Ctrs. v. Block, 786 F.2d at p. 758."

(D.C. Cir. 1985); *Washington Mobilization Committee v. Cullinane,* 566 F.2d 107, 117 (D.C. Cir. 1977). As the Supreme Court stated in *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972):

> "We insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."

Pursuant to the Administrative Procedure Act, an agency is required to publish all substantive rules of general applicability, statements of policy, or matters which adversely effect any segment of the public in the Code of Federal Regulations. 5 U.S.C. § 552(a)(1)(D).

Here, there can be no doubt the "well-matured" standard is a substantive rule of general applicability which has a significant impact on cross-petitioners. A maturity standard utilized to determine a fruit's marketability clearly applies to all tree fruit handlers — and is not merely an internal procedure or practice. See, *Hogg v. U.S.*, 428 F.2d 274 (6th Cir. 1970). In addition, as the committee members' enforcement of the "well-matured" standard forced virtually all tree fruit handlers (including cross-petitioners) to discard fruit which met U.S. No. 1 maturity but not well-maturity, it is undeniable that this regulation worked a significant adverse impact upon a segment of the public. 5 U.S.C. 552(a)(1)(D); see, *Anderson v. Butz*, 550 F.2d 459, 463.

The Secretary's 1980 through 1987 amendments to the Nectarine, Peach and Plum Marketing Order maturity regulations make absolutely no reference to either a "higher" or "well-matured" maturity regulation (see App. to Cross-

Petition at pp. 8a-17a. As such, the regulations certainly do not provide fair warning of proscribed conduct. An individual reading the regulations set forth in the C.F.R. could not possibly realize that the minimum maturity standard was anything other than U.S. No. 1.

Further, the Ninth Circuit's conclusion that the Secretary provided the committees with the authority to raise the maturity standard to something above U.S. No. 1 is not supported by the language of the maturity regulations at issue. Although cross-petitioners disagree with the Court's implication that the Secretary could lawfully allow the committees to promulgate heightened maturity standards (App. to Pet. for Cert. at p. 25a.), that finding is not in contention here.[20] The question presently addressed to the Court is — where in the regulations published in the Federal Register and codified in the Code of Federal Regulations is the term "well-matured" referenced or adopted prior to 1988?

Regardless of the Ninth Circuit's conclusion that the Secretary intended to raise the underlying minimum maturity standard to "well-matured" in 1980, that intent was not effectuated until it was eventually published in the Federal Register and the C.F.R. in 1988. Regulations subject to the

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[20]The Agricultural Marketing Agreement Act, and the marketing orders themselves, make it clear the the Secretary may not grant authority to the committees to adopt and implement regulations. The committees are limited only to making recommendations to the Secretary regarding amendments to any existing marketing order (see 7 U.S.C. §608c(7)(C)(iv); 7 CFR §§ 916.30, 916.51, 917.33, 917.40). Additionally, while the AMAA and the marketing orders provide that the committees may adopt rules and regulations to effectuate the terms and provisions of the marketing orders, in *Wileman v. Giannini*, supra, 909 F.2d 332, the Court understood that the raising of maturity standards " . . . are not the type of ministerial or facilitative regulations" that the Secretary could allow the committees to promulgate. *Id.*, 909 F.2d, at p. 337 fn. 7.

APA cannot be afforded the "force and effect of law" if not promulgated pursuant to the statutory procedural minimum found in that Act. *Chrysler Corp. v. Brown,* 441 U.S. 291, 313 (1979); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969).

Cross-petitioners do not challenge the Ninth Circuit's determination that the Secretary of Agriculture *intended* to raise the minimum maturity standard from U.S. No. 1 to a higher level in the 1980 marketing order amendments.[21] Regardless of the Secretary's intent, the language of the 1980 marketing order amendments unambiguously demonstrate that the underlying minimum maturity standard remained at U.S. No. 1. In fact, the minimum maturity standard continued to be U.S. No. 1 until the "well-matured" standard was codified in the marketing orders in 1988. (53 Fed. Reg. 19,226, 19,232 (1988) (codified as 7 C.F.R. §§916.356, 917.459, 917.460)).

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[21] The Secretary's silence with respect to the tree fruit committee members' actions in raising the minimum maturity standard does not equate to ratification or acceptance. *Wileman v. Giannini*, 909 F.2d at 337. However, for purposes of the issue at hand, the Secretary's intent (or lack thereof) as demonstrated by his silence is not relevant to the determination of whether the "well-matured" standard was published in the CFR, and thus enforceable law.

CONCLUSION

Should this Court grant USDA's Petition for Writ of Certiorari, the instant cross-petition should be granted to resolve these important questions.

Respectfully submitted,

Thomas E. Campagne
(Counsel of Record)
Clifford C. Kemper
Jeffrey C. Heeren
The Law Firm of
Thomas E. Campagne &
Associates
Attorneys for Cross-Petitioners